

Case No.: PD-0034-21

FILED
COURT OF CRIMINAL APPEALS
1/22/2021
DEANA WILLIAMSON, CLERK

In the Texas Court of Criminal Appeals

**CORNELL WITCHER, III,
APPELLANT**

v.

**THE STATE OF TEXAS,
APPELLEE.**

In Response to Petition for Discretionary Review Filed by the State; Direct Appeal from the Sixth Court of Appeals in cause Number 06-20-00040-CR; Direct Appeal from the trial court in cause number 18F1367-202, 202nd Judicial District Court, The Honorable John Tidwell, presiding.

Appellant's Response to the State's Petition for Discretionary Review

Niles Illich
Scott H. Palmer, P.C.
15455 Dallas Parkway, Suite 540
Addison, Texas 75001
Direct: 972-204-5452
Facsimile: 214-922-9900
Email: Niles@scottpalmerlaw.com

STATEMENT CONCERNING ORAL ARGUMENT

Appellant did not request oral argument and Appellee shares the view that this case does not merit oral argument.

RESPONSE TO STATEMENT UNDER RULE 66.3

Arguably the State does not present a reason for review under Rule 66.3. To the degree the State has complied with Rule 66.3 it appears to seek review under Rule 66.3(f). This case does not deserve review under Rule 66.3(f). Instead this case is nearly identical to *Griffith*, a unanimous and unpublished opinion by Judge Hervey from April 2019. This Court accepted *Griffith* because, presumably, Chief Judge Gray dissented from the motion for reconsideration. Here the intermediate-appellate justices are of one, unanimous voice.

TABLE OF CONTENTS

STATEMENT CONCERNING ORAL ARGUMENT	2
RESPONSE TO STATEMENT UNDER RULE 66.3.....	2
TABLE OF AUTHORITIES	3
CONCLUSION AND PRAYER	9
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

Cases

Griffith v. State,

No. PD-0639-18, 2019 Tex. Crim. App. Unpub. LEXIS 188, at *1 (Crim. App. Apr. 3, 2019).....7, 9

Witcher v. State,

No. 06-20-00040-CR, 2020 Tex. App. LEXIS 10073, at *9-*10 (Tex. App.—Texarkana Dec. 21, 2020, pet. pending).....7, 9

Case No. PD-0034-21

IN THE COURT OF CRIMINAL APPEALS

**CORNELL LADELL WITCHER, III,
APPELLANT**

v.

**THE STATE OF TEXAS,
APPELLEE.**

To the Honorable Judges of the Texas Court of Criminal Appeals:

Cornell Witcher, III, Appellant, presents this Response to the State's Petition for Discretionary Review.

The only question presented for review is whether there was legally sufficient evidence for the jury to have found beyond a reasonable doubt that the alleged offenses occurred over a period of thirty days or more. The end date is agreed upon, but there is no evidence to allow a rational juror to conclude that the assaults occurred over thirty days or more.

The evidence established the following as it relates to when the assaults started:

- Mary testified that Witcher “started coming into the room and doing those things to [her]” “[w]hen [her] brother went to jail.” [19 RR 84].
- After Mary’s family learned of the assaults, they took her to Wadley, where exams were performed. [State’s Ex. 1]. The history of the assault in the medical record reads: “Pt stated that Cornell [Witcher] has been coming into her brother’s room (where she has been sleeping while her brother is away) at night when she is asleep and after her mom goes to work.” [State’s Ex. 1, page 2].
- The attorney for the State asked Mary’s sister about when the assaults occurred, but the response was non-committal and uncertain. [19 RR 20-21]. The attorney for the State then asked, “[a]nd so this night, you finally – and this is, oh, maybe June 26th, give or take, of 2018 – July, excuse me. Is that right?” The witness answered, “Yes.” [19 RR 22].
- Testimony from the SANE nurse indicated that the last assault occurred the night before Mary met with the nurse, which was presumably July 28, 2018. [19 CR 47; State’s Ex. 1, dated July 28, 2020].
- Mary testified similarly. [19 RR 81]. She testified that the assaults started when her brother went to prison, but she did not provide a specific date. [19 RR 81; 84; 86]. Three times the attorney for the State asked Mary about when

the assaults started and three times Mary’s answer remained the same, “when Dayday went to jail.” [19 RR 81; 84; 86].

- The investigator for the district attorney’s office testified that the indictment covered conduct from June 10, 2018 through July 28, 2018 and that the testimony in the courtroom was that the abuse started in June when Dayday went to jail. [19 RR 89]. The investigator then testified that he confirmed Dayday went to jail “around that time in 2008.” (Emphasis added). [19 RR 89]. But this was a misstatement because Mary was not born until 2008 and the investigator promptly clarified his testimony to indicate that the assaults began sometime in June 2018. [State’s Ex. 1; 19 RR 90].
- Officer Thompson testified “Those dates, when Dayday went to jail, the June 10th, 2018 through July 28th, when they confronted him, 2018, those are the dates as close as possible that you could get to confirm by Kiki and the other evidence in the case?” Officer Thompson answered, “Correct.” [19 RR 106].

The Court of Appeals explained:

... testimony regarding when the abuse began is sparse and ambiguous. Mary testified that it began when her brother went to jail. At trial, the State did not establish the precise date on which her brother went to jail, and on appeal, the State does not explain how this testimony establishes that date. And the evidence in this case only vaguely references a time span during which her brother could have gone to jail. Thompson testified that his investigation showed that Darren was arrested and incarcerated ‘around’ the period between June 10 and July 28, 2018.

Erin agreed that Darren went to jail ‘in about June of—maybe June 10th, give or take.’ The words ‘at some point,’ ‘around,’ ‘about,’ ‘maybe,’ and ‘give or take’ make the date more uncertain, not less. Thus, the jury could only have speculated from this testimony that Mary’s brother went to jail on June 10.

Witcher v. State, No. 06-20-00040-CR, 2020 Tex. App. LEXIS 10073, at *9-*10 (Tex. App.—Texarkana Dec. 21, 2020, pet. pending) (mem. op., not designated for publication).

The dispute in this case is similar to that in *Griffith*.

In *Griffith*, a 2019 unpublished case by Judge Hervey, this Court considered an argument similar to the one presented here.¹ *Griffith v. State*, No. PD-0639-18, 2019 Tex. Crim. App. Unpub. LEXIS 188, at *1 (Crim. App. Apr. 3, 2019). The intermediate-appellate court affirmed the trial court’s verdict, but this Court reversed—in a unanimous and unpublished opinion—because the evidence was insufficient to show a second assault before the victim’s fourteenth birthday. The Court reformed the judgment to reflect a conviction for first-degree Aggravated Sexual Assault of a Child. *Id.* at *15.

In *Griffith*, this Court explained why the evidence was insufficient to support the verdict. The Court wrote:

Part of the problem with the dates in this case is a disconnect between the case that the State believed that it could prove, and the evidence that

¹ In *Griffith*, Chief Justice Gray dissented from the denial of a motion for reconsideration on the basis that the evidence was insufficient to support the verdict. Thus there was a distinct reason under Rule 66.3 for this Court to accept and hear the case. Here the Sixth Court of Appeals was unanimous.

it presented to the jury. The State believed that it could show that the first of the Frost incidents occurred before A.G.'s birthday on April 4, 2013. There were lengthy pretrial arguments about the timeline presented by the State, but that evidence was never presented to the jury. At the pretrial outcry hearing, Bailey testified that the victim told her about four incidents. The first was the Dawson incident in 2012. The second incident occurred in the house in Frost. The third time happened six or seven months after the second time, and the fourth time happened 'a couple of weeks' after the third time. A.G. also told Bailey that the fourth incident was three weeks before the December 30 interview. Bailey testified that A.G. used the term 'a couple of weeks' in a conversational manner, and did not necessarily mean a literal two week period. The State clarified that the fourth assault happened between Thanksgiving and Christmas. The victim did not use any holidays or events to set a date for the third assault, but she did say that it happened when she was being home schooled and it was 'hot outside.'

Using these time periods, the State attempted to count back from the date of the forensic interview. The State's theory was that the fourth assault happened in early December or late November. 'A couple of weeks' earlier would put the third incident in mid-November, but the prosecutor took the 'couple of weeks' comment and seemed to stretch that time, arguing that the third incident took place in October or even September—as much as eight weeks before the fourth incident—because other evidence showed that A.G. was being home schooled and that it was 'hot outside' at the time. Based on this interpretation, and counting back another six or seven months from September, the prosecutor put the second incident in February or March. This would have been before A.G.'s fourteenth birthday in April. The State's proposed timeline was fiercely contested at the pretrial hearing, with the defense accusing the State of 'messing' with the dates to try and place the second incident before A.G.'s fourteenth birthday. The State's timeline at the pretrial outcry hearing was plausible, and the jury might have used these dates to reasonably infer that the second assault

occurred before A.G.'s fourteenth birthday, but the problem is that none of this evidence was presented to the jury. A jury cannot make inferences based on evidence that they never heard.

Id. at *13-*15.

The Court correctly determined that the evidence was insufficient to support the verdict, reformed the conviction to reflect a conviction for the lesser-included offense of first-degree Aggravated Sexual Assault of a Child and remanded for a new sentencing hearing. *Id.* at *15-16.

The same problems that plagued *Griffith* infect this case. As the Sixth Court of Appeals wrote in this case, “[t]he words ‘at some point,’ ‘around,’ ‘about,’ ‘maybe,’ and ‘give or take’ make the date more uncertain, not less. Thus, the jury could only have speculated from this testimony that Mary’s brother went to jail on June 10.” *Witcher*, 2020 Tex. App. LEXIS 10073, at *10.

CONCLUSION AND PRAYER

This case falls squarely within the admonitions issued by the Court of Criminal Appeals in *Griffith*. Here the evidence allows for reasonable speculation, but the evidence does not support the inference that the first assault occurred on or before June 26, 2018. Thus the evidence does not support the verdict. Appellee asks this Court to deny Appellant’s petition for discretionary review.

Respectfully Submitted,

/s/ Niles Illich

Niles Illich
SBOT: 24069969
Scott H. Palmer, P.C.
Addison, Texas 75001
Direct: (972) 204-5452
Facsimile: (214) 922-9900
Email: Niles@scottpalmerlaw.com

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.4(G) of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 4,500 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 1,925 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

This is to certify that on January 21, 2021 that a true and correct copy of this Brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows: Counsel for the State: John R. Messinger: information@spa.texas.gov.

/s/ Niles Illich
Niles Illich

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Lauren Lewison on behalf of Niles Illich
Bar No. 24069969
lauren@scottpalmerlaw.com
Envelope ID: 49905470
Status as of 1/22/2021 9:08 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Niles Illich		Niles@scottpalmerlaw.com	1/21/2021 1:00:36 PM	SENT
John Messinger		information@spa.texas.gov	1/21/2021 1:00:36 PM	SENT
Randle Smolarz		rande.smolz@txkusa.org	1/21/2021 1:00:36 PM	ERROR